SUPREME COURT, U. S.
SEP 19 1961
JAMES R. BROWNING, Clerk

Supreme Court of The United States

OCTOBER TERM, 1961

No. 420

RUTH E. TURNER, Administrix of the Estate of JERRALD W. TURNER, Deceased and THE AETNA CASUALTY AND SURETY COMPANY, *Intervenor*,
PETITIONER

versus

TIDMORE CONSTRUCTION COMPANY
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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versus

TIDMORE CONSTRUCTION COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner prays for a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, dated and entered in this case on May 2, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 290 F. 2d 191 (A-1*). Petition for rehearing was denied on June 21, 1961.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1961. The Jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254.

QUESTION INVOLVED

Is judgment notwithstanding the verdict of the jury proper in a case where the Court bases its Judgment N.O.V. upon the testimony of a party defendant[1] who, as such, is deemed an "interested witness" and the credibility of whose testimony is properly for the jury's determination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law."

28 U. S. C. 2106

"The Supreme Court or any other court of appellate jurisdication may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as many be just under the circumstances."

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*Reference is to page number of appendix of this Petition.

[1]In this case the president of a defendant corporation, which legal entity can speak only through its officers, agents and employees.

STATEMENT OF CASE

Petitioner, Ruth E. Turner, is a citizen and resident of Greenville, South Carolina. Respondent Tidmore Construction Company is a corporation of the State of Texas. The action herein was commenced on May 15, 1958 in the United States District Court for the Northern District of Texas by petitioner against four defendants for the alleged wrongful death of her son, Jerrald W. Turner, who was killed in Abilene, Texas on May 26, 1956.

The case came on for trial against two of the defendants, Tidmore Construction Company, Respondent herein, and the defendant Abilene Crane Service[2] at Abilene on November 15, 1959 before the District Judge and a jury. The testimony show that petitioner's intestate, Jerrald W. Turner, a minor, eighteen years of age (Tr. 151), whose life ended on May 26, 1956, was born in Greenville, South Carolina and lived there all of his life except for the last six months of it which were spent in Texas, where he served with the U.S. Air Force at bases in San Antonio and Abilene (Tr. 156).

May 26, 1956 was a Saturday and young Turner, not being on military duty that day, was working for a contractor (Tr. 151-152) who was furnishing material and labor to move a large quantity of steel decking (Tr. 237) onto Tidmore's job site on Fourteenth Street in Abilene where Tidmore was constructing the River Oaks Shopping Center for Thomasson Enterprises (Tr. 63-64). The premises were turned over to Tidmore who was "in complete control" of the project (Tr. 64, 68).

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[2]The Original Complaint named West Texas Utilities Company, Raymond Thomasson, Sr., et al., etc., and Abilene Crane Service Incorporated as additional parties defendant. Prior to trial the Complaint was amended to exclude the defendants West Texas Utilities Company, and Raymond Thomasson, Sr., et al., etc. The jury found that Turner "was an employee of Abilene Crane Service" (Special Issue No. 6) and, no appeal having been taken therefrom, suit against the defendant Abilene Crane Service Incorporated is now ended. The question of the employment status of Turner being not clearly determinable and much disputed from the outset, Aetna Casualty and Surety Company, as workmen's compensation insurance carrier for Turner's alleged employer, West Texas Steel Erectors, would pay only One Thousand Five Hundred ($1,500.00) Dollars in settlement instead of the full amount provided by the Texas Workmen's Compensation Act. Aetna appears herein as Intervener, asserting its claim to subrogation in the sum of One Thousand Five Hundred ($1,500.00) Dollars. (Tr. 296-297.)

A line of high voltage electricity wires passed over the entrance into the job site from Fourteenth Street (Exhibit P-2, Tr. 71). The wires of this high voltage line, however, were not being carried on "H" frames or similar type of high voltage electric power line construction (Exhibit P-2). When one looked up at the wires from the ground there was nothing about their appearances to suggest that they were uninsulated (Tr. 77). No signs or other means of warning were employed by Tidmore to inform workmen that the wires which passed over the entrance on its job site were high voltage electricity lines (Tr. 95).

An expert witness called by plaintiffs, while on cross examination by counsel for defendant, was asked if he was "an expert on what kind of warning signs contractors give for high voltage lines", and he answered "yes, sir" (Tr. 133). Thereafter, this same witness was asked if he thought it was necessary "for a contractor to have a sign up there saying "High Voltage Wire" at the shopping center "that we are talking about here", and the witness replied that "in my opinion, I think that the sign should have been there" (Tr. 134-135). These signs are generally in red letters on black background, reading "Danger High Voltage" (Tr. 135).

The Court presented Special Issues to the jury which required the jury to find, specifically, whether or not "the defendant Tidmore Construction Company was guilty of negligence which was a proximate cause of the death of Jerrald W. Turner, in failing to warn workmen, including said Turner, of the existence of the high voltage electric power line" (Tr. 260). The jury found that the defendant Tidmore Construction Company, respondent, was guilty of negligence which was a proximate cause of the death of Jerrald W. Turner and returned a verdict for petitioner. Immediately following reception of the jury's verdict, respondent moved on November 16, 1959 for judgment n.o.v., which motion the Court took under advisement, and, on February 11, 1960, granted. Petitioner thereafter appealed to the Fifth Circuit Court of Appeals from the District Court's judgment veredicto non obstante.

In the interim of time between the date on which the

notice of appeal was filed and the date on which the case was reached for argument in the Fifth Circuit Court of Appeals, the Fifth Circuit Court decided the case of *Gulf Oil Corporation v. Bivens* (C.A. 5, Tex.), 276 F. (2d) 753, cert. den. 364 U.S. 835, reh. den, 364 U.S. 906. The rationale of the *Bivens case, supra* is that the duty to warn employees of an independent contractor "is discharged if those in charge of the work for the independent contractor are given warning or have knowledge of the danger." (Emphasis added to words, "or have knowledge of").

The Court of Appeals held that the instant case was governed by the decisional law of *Gulf Oil Corporation v. Bivens, supra*, stating that Carpenter: "an officer of the subcontractor corporation which employed Turner and who was the operator of the crane, knew of the presence of the wires and that they were high voltage electric wires. This being so, the duty of Tidmore to Turner was satisfied."

Petitioner has taken the position throughout that the testimony of this witness is not sufficient to bring the instant case within the ambit of the *Bivens case, supra*, as a matter of law (referring to where the fact can be found only one way, allowing the Court to decide the case without the aid of a jury), because the testimony of an officer of the defendant Abilene Crane Service, Clyde Carpenter, that he "knew" about the high voltage electric line was the testimony of an "interested witness" subject to a test of its credibility properly for the jury, and not the Court to make. Recognizing that authority for this principle of judicial procedure might be viewed as resting not entirely upon procedural law but also upon substantive law, petitioner referenced her position to the law of the State of Texas, which accords with Federal practice, to the effect that "the mere fact that the witness is interested is deemed sufficient to require the credibility of his testimony to be submitted to the jury" and the "testimony of a party to a suit *will not authorize or support* an instructed verdict."[3]

Nowhere, it its otherwise comprehensive opinion, did the

[3]Barker v. Coastal Builders, 271 SW (2d) 798.

Court of Appeals deal with or even mention this issue. In her petition for rehearing petitioner again sought to call the Court's attention to this issue and to secure its consideration of her position therein, but the Fifth Circuit Court of Appeals denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

In permitting a judgment, n.o.v. to be based on the testimony of a party defendant—an "interested witness"—the action of the Circuit Court of Appeals is not in accord with the decisions of this Court and invades the function of the jury, contrary to petitioner's rights under the VII Amendment to the Constitution of the United States.

In her brief on appeal to the Fifth Circuit Court of Appeals, petitioner stated:

"There was testimony, introduced in Court through deposition, by Clyde Carpenter, the Vice President of the defendant Abilene Crane Service, Inc., who was operating the crane, to the effect that he knew of the high voltage wires and told the men to watch out for them; but the only eye witness appearing in Court testified that he didn't hear the crane operator shout a warning to Jerrald Turner (Tr. 178). Moreover, the witness Clyde Carpenter was a vice president and vice-principal of the defendant Abilene Crane Service, Inc., and it is a firmly established principle of law that the testimony of a witness raises an issue for the jury to determine where the witness has an interest in the outcome of the case, *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, and the fact that a witness is interested in the result of a suit is sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact. *Sonnentheil v. Christian Morelein Brewing Co.*, 172 U.S. 401, 408."

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There is also the fact that the testimony of this witness—like the testimony of all of the witnesses presented on behalf of defendant's case, with a single exception, Tidmore's job superintendent—was offered through deposition. A deposition has

always been and still is treated as "a substitute", a "second best", *Arnstein v. Porter*, 2 Cir., 154 F. 2nd 464, 470, because "it deprives of the advantage of having the witness before the jury". In the cited case the Court pointed out that since "the appearance and manner of the witness is often a complete antidote to what he testifies, we cannot very well overestimate the importance of having the witness examined and cross-examined in the presence of the jury."

The testimony of this witness, who was an officer of the defendant Abilene Crane Service, and who did not take the witness stand in Court, but whose testimony was read from written interrogatories, was accepted by the Circuit Court to bring the instant case within the ambit of the *Bivens case*, *supra*, which it decided a short time prior to argument of the instant case. With the *Bivens case*, *supra*, as authority for the proposition that the duty to warn employees of an independent contractor is discharged if those in charge of the work for the independent contractor are given warning or have knowledge of the danger, the Court went on to accept the testimony of Clyde Carpenter that he "knew of the presence of the wires and that they were high voltage electric wires" "This being so," the Court concluded, "the duty of Tidmore to Turner was satisfied." But the important consideration is that the Court's acceptance of such testimony from an "interested witness" *does not satisfy the rules* for properly determining the credibility of the testimony of such witness.

In stating, "this being so," the Court in this case is clearly invading a function of the jury which is to determine the credibility of the testimony of an interested witness. In the instant case it appropriately would be the function of the Court to instruct the jury on the law of the *Bivens case*, *supra*, charging the jury that the defendant Tidmore Construction Company will not be held liable if it, the jury, finds that the Turner's supervisor, Carpenter, knew of the presence of the wires and that they were high voltage electric lines. It is beyond its proper function of dealing with the law in a case for a Court to decide the facts of a case to which the law must apply.

The Fifth Circuit Court of Appeals in this case has per-

formed the function of both the Court, in declaring the law, as is its duty, and in finding facts, the function of the jury. It may appear as a matter of convenience for an appellate Court to handle both functions in disposing of cases but doing so, as the Fifth Circuit Court of Appeals has done in this case, is contrary to the rights of anyone who is denied the determination of the facts of his case by a jury.

Petitioner submits that she can best convey to this Court her reasons for urging this Court to grant a Writ by referring to her petition for rehearing in the Circuit Court of Appeals. Petitioner believes that upon reading the petition, printed herein at pages A 7-11 of the Appendix, this Court will clearly recognize the authority and propriety of the basis upon which she sought an amendment by the Circuit Court of its decision and opinion. Petitioner believes that in the circumstance of the case, as disclosed by the petition made to the Court of Appeals for rehearing, her petition to this Court for a Writ is in order and proper for the consideration of this Court in the exercise of its power of supervision over the actions of the Courts below. Petitioner further believes that from a reading of the Opinion of the Circuit Court and the Petition for Rehearing, appearing in the Appendix herein, in conjunction with this Petition for Writ of Ceritorari, the error of the Circuit Court will be so clear, obvious, and undoubted as to warrant this Court's granting the actions prayed for by petitioner in the Conclusion below.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant her petition for a Writ of Certiorari, reverse the judgment of the Circuit Court, and order entry of judgment in favor of petitioner in accordance with the verdict of the jury entered in this case on November 16, 1959.

Respectfully submitted,
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